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Supreme Court of the United States

October Term, 1958

No. 424

JAMES E. McDANIEL,

Petitioner,

against

M/S LISHOLT, her engines, etc. and A. S. LISE, her owner,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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No.

JAMES E. MCDANIEL,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James E. McDaniel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on July 10, 1958.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Edelstein, J.), is set forth at pages 10a-28a of the appendix to the petitioner's brief filed in the Court of Appeals, reported in 155 F. Supp. 619.

The opinion of the United States Court of Appeals, not yet reported, is made a part of the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (1).

Jurisdiction in the District Court was based upon admiralty 28 U. S. C. 1333.

Questions Presented

Petitioner brought suit in admiralty for $200,000 damages for injuries alleged to have been caused by the unseaworthiness of respondent's vessel and by the negligence of her owner and operator (2a).*

Respondent answered denying that the unseaworthiness of its vessel or the negligence of her owner and operator caused libelant's injury. It pleaded contributory negligence and assumption of risk as separate defenses (6a).

The Court of Appeals held that:

(1) The warranty of seaworthiness extends "to shore-based workers only if they are doing work traditionally done by seamen."

As to petitioner, the court concluded "though his being aboard may have been of incidental benefit to the ship, his purpose in being there was to protect the Canal Zone from fires. His presence aboard the ship cannot be explained on the theory that he was performing any duty within the traditional or customary scope of activity of the crew." (Appendix to this petition page 16.) Therefore he is not protected by the warranty.

(2) Since petitioner was a fireman by calling he could not recover on the ground of the owner's negligence. While

* Numbers refer to pages in the stenographic minutes of the trial. Numbers followed by the letter "a" refer to pages in the Appendix to petitioner's brief in the Court of Appeals.

standing fire watch he was a licensee and "accordingly the owner has no greater duty than to refrain from the infliction of wilful or wanton injury," citing its decision in *Kermarec* v. *Compagnie Generale Transatlantique*, 2d Cir., 245 F. 2d 175, cert. granted 355 U. S. 902; No. 22 on the calendar of this Court.

The decision of the Court of Appeals presents the following questions:

1. Whether a single member of a fire department serving aboard ship as a fire watch and assisting stevedores engaged in removing stores from the vessel's refrigerated rooms is entitled to a warranty that such rooms are seaworthy?

2. Whether a single member of a fire department serving aboard as a fire watch and assisting stevedores engaged in removing stores from the vessel's refrigerated rooms is owed the duty of reasonable care?

Statement of Case

There was no controversy in respect to the facts.

At about 12:20 A. M. February 6, 1954, the M/S LISHOLT, a Norwegian-flag dry cargo vessel, while tied up at a dock in the Panama Canal Zone caught fire. The fire department of the Canal Zone Government was called to fight the fire, which was considered extinguished at 8:00 A. M. the next morning. The captain of the fire department and his fire-fighting crew left the vessel at that time. A number of the crew and the Master also went ashore during the day.

At 4:00 P. M., eight hours later, petitioner went aboard the vessel to serve as a fire watch. He was twenty-six years old and had been a member of the Zone fire department for about six months. He was the only member of the fire department aboard.

At the same time there were aboard several members of the crew and a gang of stevedores, who had been engaged by the ship's agent with the consent of the Captain to remove the ship's stores from its refrigerated rooms. At about 5:30 an explosion occurred in the refrigerated rooms resulting in the death of four stevedores and one chemist employed by the Panama Canal Company and injuries to eleven stevedores and the petitioner. Petitioner was subsequently hospitalized for many days with severe burns resulting in permanent disabilities.

After the explosion, there was an investigation by the Board of Local Inspectors of the Canal Zone Government. By stipulation, a transcript of the testimony then taken together with exhibits was used by the parties.

The following facts relate to the unseaworthy condition of the vessel and the negligence of her Master and crew which directly caused petitioner's injuries.

About 10 A. M. the Chief Steward and Chief Cook had inspected the freeze box (34). When they opened its door they got "a kind of smoke or gas right up against us, so we had to move back. We couldn't push through in the beginning" (35). This was reported to the Master before 11 A. M. (44, 49).

Prior to 11 A. M. the Master talked with the Chief Officer, Chief Steward and the ship's agent and it was decided to take the provisions off "as soon as it was safe" (43). The Master then believed the conditions were such that no one "could go down there" (45).

The Master made no inspection of the area, nor ordered anyone else to do so. Nor did he indicate in any manner how the freeze box was to be made "safe". No other ship's officer inspected the chill room or freeze box between the fire and the explosion. They left the matter of unloading the stores to the Chief Steward (39, 40; 43, 44).

At 11:30 A. M. the stevedores were told in the presence of the ship's agent that the gas they observed in the refrigerated space was harmless (217; 220).

At about 3 P. M. the discharging of stores commenced.

Meanwhile, at approximately 4:00 P. M., petitioner boarded the vessel to act as a fire watch.

Rule 45 of the Rules and Regulations Governing Navigation of the Panama Canal and Adjacent Waters provides:

> "Protection against fire: A vessel lying at any wharf in the Canal Zone shall at all times keep a satisfactory watch for fire * * * ".

Sometime after 4:30 P. M. and before the explosion, the stevedore foreman complained to the ship's agent about the condition of the freeze box. The agent asked if a chemist had been sent for and blowers set up. He was told that lines had been laid for the blowers but they were not in operation.

Throughout the day the Chief Steward and the Chief Cook worked and smoked in the area and so did others.

Shortly before the explosion, a stevedore foreman refused to enter the freeze box because "there was an awful odor of gas in there". Conditions in the area were so uncomfortable the stevedores stopped their work.

A few minutes before the explosion, petitioner was asked by a stevedore foreman to join him in an inspection of the chill room and freeze box. Petitioner accompanied him and proceeded into the freeze box where he noted a strong odor and suggested that they leave. Leaving the freeze box and while in the chill room a flash explosion ensued in which petitioner was severely burned and the stevedore at his side was killed. Three other stevedores were killed and a number injured.

The Court found that as a direct result of the fire the cork insulation in the interior wall of the freeze box had been smoldering progressively throughout the day, creating an explosive gas (19a) and concluded that:

> "The smoldering in the cork insulation in the wall of the chill and freeze boxes was an unseaworthy condition, as was the explosive atmosphere created thereby." (23a)

Throughout the afternoon and until the moment of the explosion, the Chief Steward, the Chief Cook and others were permitted to and did smoke in the area (15a; 37, 38; 47).

It is a fair inference that this combination of accumulating explosive gas in a confined area and smoking by the stevedores and the crew produced the explosion and libellant's injuries.

Reasons for Granting the Writ

1. The decision of the Court of Appeals equates petitioner with the plaintiff in the *Kermarec* case, *supra*. Certiorari was granted, 355 U. S. 902 at page 178 and it is now No. 22 on the calendar of this Court. In both cases it held the claimants were licensees and therefore not entitled to the protection of the warranty of seaworthiness and were owed no duty other than to refrain from wanton or wilful negligence.

As to *Kermarec*, he "did not make any contribution to the ship's safety, preservation or progress; he did not submit his life and safety to the ship as a seaman does; he did not load her for a voyage as a stevedore does; consequently he does not have any right to recover for unseaworthiness." (245 F. 2d, p. 176)

As to petitioner, "although his being aboard may have been of incidental benefit to the ship, his purpose in being

there was to protect the Canal Zone from fires. His presence aboard the ship cannot be explained on the theory that he was performing any duty within the traditional or customary scope of activity of the crew". (App. to this petition, p. 16)

In denying petitioner the right to recover on the ground of the owner's negligence the Court of Appeals applied the same rule in both cases citing the *Kermarec* case as authority for its ruling in the instant case.

The decision of this Court in the *Kermarec* case might well call for a reversal of the decision in the instant case.

2. The decision is in conflict with the decisions of this Court relating to the doctrine of seaworthiness.

> *Seas Shipping Co. Inc.* v. *Sieracki*, 328 U. S. 85;
> *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406.

Subsequent to the decision of this Court in the *Sieracki* case, the Second Circuit chose to construe that decision narrowly and refused to extend the rule to cover harbor workers other than stevedores. *Guerrini* v. *United States*, 2 Cir., 167 F. 2d 352.

This Court's decision in the *Hawn* case made that position untenable, but it would seem that the majority of the judges sitting in the Second Circuit now seek to give a limited meaning to the *Hawn* case. Their view is that since *Hawn's* work was in aid of loading operations the *Sieracki* rule does not extend to all harbor workers aboard ship but is still limited to workers who are performing essential ship's service of a kind thought to have been formerly performed by the crew. *Halecki* v. *United New York & New Jersey S. H. P. Ass'n*, 2 Cir., 251 F. 2d. Certiorari was granted April 28, 1958 and the case is now No. 56 on the calendar of this Court.

The debate revolves about the meaning of the language used by this Court at page 413 in *Hawn*:

> "The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who has been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

Petitioner submits that a fair reading of that decision embraces all workers aboard a vessel in navigable waters with a legitimate purpose who are "subjected to the same dangers" and therefore are "entitled to like treatment under the law." And this is true regardless of the name of their trade or calling.

This concept of the range of the warranty's "humanitarian policy" has led Courts to extend it, not alone to crew members, stevedores and carpenters, but also to a watchman, *Ross* v. *Steamship Zeeland*, 4th Cir., 240 F. 2d 820 (1957), and to a member of the United States Army, *Caudill* v. *Victory Carriers*, 149 F. Supp. 11 (1957).

At the time petitioner was injured, there were aboard members of the crew, stevedores and a chemist. At the moment of the explosion, petitioner, the chemist and a stevedore were engaged in the same service, inspecting the refrigerated space, serving the same purpose of enabling the off-loading of the ship's stores to continue. By some miracle no crew member was injured. The stevedore at petitioner's side and the chemist were killed. Other stevedores were killed and a number injured. Concededly the tragedy resulted from the unseaworthiness of the refrigerated area.

Does not a fair reading of the decisions in the *Sieracki* and *Hawn* cases indicate that in these circumstances the owner was liable to all of those injured or to none?

Is the performance of work "traditionally done by seamen" a *sine qua non* to recovery on the theory of seaworthiness?

Must the shoreside worker be employed by an independent contractor who in turn has contracted with the ship to perform "work traditionally done by seamen"?

3. At the present time there is an important conflict between the Second and Third United States Circuit Courts of Appeal. In the instant case the Second Circuit has applied its ruling in *Berge* v. *National Bulk Carrier Corp.*, 2d Cir., 251 F. 2d 717, where the Court refused to extend the warranty to a worker engaged in making major repairs. However, in *Read* v. *United States*, 3rd Cir., 201 F. 2d 758, in similar circumstances exactly the contrary conclusion was reached.

4. The Court's holding that petitioner was not doing work traditionally done by seamen was arbitrary with no evidence to support it.

Petitioner was unquestionably doing a seaman's work. In the first place, a ship is required by the regulations of the Canal Zone to maintain a fire watch when in Canal Zone waters (56). It is, of course, true—as the Court of Appeals noted—that the purpose of this rule is the protection of the Canal Zone, but it does not make maintenance of a fire watch any the less seaman's work when a ship is in Canal Zone waters.

In the second place, maintenance of a watch is historically not only seamen's work but, because of the perils of the sea, perhaps the most important single feature of seamen's work. That this is so is evidenced by the fact that a seaman's tour of duty on board ship is known as a "watch". To suggest that a man on watch aboard a ship is not doing traditional seamen's work is, petitioner submits, a most violent and extraordinary misstatement of the immemorial duties of a seaman.

Surely, it was arbitrary to hold that in discharging that duty petitioner was a mere licensee and his rights were to be determined as though he were *fighting a fire on land* (28a).

5. This Court has never passed upon the question of the status of a member of a fire department acting aboard a vessel as a fire watch.

Wherefore, petitioner respectfully prays that a writ of certiorari issue under the seal of this Court to review the judgment and decree herein of the United States Court of Appeals for the Second Circuit, to reverse said judgment and decree and to remand the cause to the District Court to proceed according to law.

October 6, 1958.

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Counsel for Petitioner.

APPENDIX

Opinion of United States Court of Appeals for Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 353—October Term, 1957.

(Argued May 9, 1958. Decided July 10, 1958.)

Docket No. 24914.

JAMES E. McDANIEL,

Libelant-Appellant,

against

M/S LISHOLT, her engines etc. and
A. S. LISE, her owner,

Respondent-Appellee.

Before:

WATERMAN and MOORE, *Circuit Judges*,
and GALSTON, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, David N. Edelstein, *Judge*.

James E. McDaniel appeals from the dismissal on the merits of his libel against the M/S LISHOLT and her owner, A. S. Lise, to recover damages for personal injuries. Affirmed.

MACLAY, MORGAN & WILLIAMS, New York, N. Y. (Hugh S. Williamson and William I. Stoddard, New York, N. Y., of Counsel), *for libellant-appellant.*

HAIGHT, GARDNER, POOR & HAVENS, New York, N. Y. (Francis X. Byrn and James M. Estabrook, New York, N. Y., of Counsel), *for respondent-appellee.*

GALSTON, *District Judge*:

Libelant appeals from a final decree of the United States District Court for the Southern District of New York entered October 31, 1957 after a trial, dismissing the libel.

Libelant brought suit in admiralty for $200,000 damages for personal injuries allegedly caused by the unseaworthiness of respondent's vessel and by the negligence of her owner and operator.

Libelant was a member of the Fire Department of the Panama Canal Zone Government. On February 6, 1954, at about 12:20 A. M., the vessel M/S LISHOLT was tied up at Dock 6, Balboa Dock, Panama Canal Zone, while oil was being pumped from ashore into fuel tanks aboard the ship. Thereafter some of the oil overflowed and ignited. The Canal Zone Fire Department was called in promptly and fought the fire. The fire was believed to be extinguished at about 8:00 A. M. on that day. At about 4:00 P. M. libelant was assigned to the vessel as a fire watcher by the Fire Department of the Canal Zone Government. His duties included guarding against any re-igniting of the blaze, taking care of any hidden fires which might have been overlooked, extinguishing fires he could reasonably handle and reporting those fires he could not handle.

Prior to the time libelant had come aboard, members of the crew of the vessel had detected an odor in the ship's refrigerator room. After libelant came aboard the ship he went to the refrigerator room and detected an odor which he believed to be ammonia gas. He then went on deck for the purpose of reporting the condition to the Fire Department. On deck he met a chemist and the stevedore foreman. These three men decided on a further investigation and the chemist and libelant went below to the refrigerator room where libelant noted the odor was stronger. He suggested that they leave. Immediately after they had left the refrigerator room a flash explosion occurred, as a result of which several persons were killed and the libelant was severely injured. The explosion resulted from the release of carbon monoxide gas caused by smouldering in the cork insulation of the refrigerator room due to the fire. There was no finding as to the actual igniting agent that caused the explosion.

The court below determined that libelant, as an employee of the Canal Zone Fire Department performing fire watch duties aboard the ship, was a licensee who was there by reason of public necessity and in the primary interests of the Panama Canal Zone.

The libelant seeks to have the court extend to him the ship owner's absolute duty to provide a seaworthy ship, a duty traditionally owed to seamen who sail with the ship and who are subjected to the perils of the sea. *The Osceola* (1902), 189 U. S. 158, 23 S. Ct. 483, 47 L. ed. 760. Following a dictum in that Supreme Court decision and influenced by a humanitarian policy, the courts have developed as part of the general maritime law a doctrine allowing recovery for injuries caused by the unseaworthiness of a vessel, imposing liability on the ship owner and the ship, and making this liability an absolute duty to provide a seaworthy ship. This doctrine has been made available to members of the crew, stevedores and shore-based workers who come aboard in the employ of inde-

pendent contractors to perform the type of work traditionally done by seamen. *Seas Shipping Co.* v. *Sieracki* (1946), 328 U. S. 85, 66 S. Ct. 872, 90 L. ed. 1099; *Pope & Talbot* v. *Hawn* (1953), 346 U. S. 406, 74 S. Ct. 202, 98 L. ed. 143; *Petterson* v. *Alaska SS. Co.* (1954), 347 U. S. 396, 74 S. Ct. 601, 98 L. ed. 798; *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Ass'n* (2d Circuit), 251 F. 2d 708, cert. granted, June 9, 1958.

But the absolute liability imposed on the ship owner and ship can be extended to shore-based workers only if they are doing work traditionally done by seamen. We have stated that whether this special protection is afforded " * * * depends upon whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform." *Berge* v. *National Bulk Carriers Corp.* (2d Circuit), 251 F. 2d 717, 718, cert. den'd May 19, 1958. In that case we refused to extend the warranty of seaworthiness to a shore-based rigger engaged in work designed to be a virtual rebuilding of the interior of the vessel. In *Berryhill* v. *Pacific Far East Line* (9th Circuit), 238 F. 2d 385, cert. den'd 354 U. S. 938, 77 S. Ct. 1400, 1 L. ed. 2d 1537, recovery was denied for the same reason to a workman engaged in major repairs aboard a dry-docked vessel.

Libelant was employed by the Canal Zone Fire Department and was aboard the ship in the performance of his duties to that Department rather than by any arrangement with the ship owner. Though his being aboard may have been of incidental benefit to the ship, his purpose in being there was to protect the Canal Zone from fires. His presence aboard the ship cannot be explained on the theory that he was performing any duty within the traditional or customary scope of activity of the crew. He was there not because the ship owner chose to employ him rather than a member of the crew to undertake a particular job, but rather because the Fire Department ordered him aboard to maintain safety in the Canal Zone.

In addition, it is undisputed that the vessel was unseaworthy at the time libelant went aboard. He was stationed aboard the ship because of the vessel's unseaworthiness occasioned by the fire. There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness.

We find, therefore, that the warranty of seaworthiness does not extend to the libelant.

Libelant claims further that he is entitled to recover on the ground of the owner's negligence. It has been generally held that a fireman entering premises in the performance of his duties is a licensee, and accordingly the owner has no greater duty than to refrain from the infliction of wilful or wanton injury on the fireman and to exercise ordinary care to avoid injuring the fireman by any affirmative and active acts of negligence. As was stated in *Kermarec* v. *Compagnie Generale Transatlantique* (2d Circuit), 245 F. 2d 175, cert. granted 355 U. S. 902, at p. 178:

> "The general rule is that the ship owner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger."

No wilful or wanton conduct on the part of the owner was proved.

Although there was in fact a peril, there was no showing that the owner had any knowledge of the conditions within the refrigerator room that gave rise to the explosion, or any opportunity to give notice to the libelant of this peril.

Moreover, as a fireman libelant assumed the ordinary risks of his calling. One of the purposes for which the libelant came aboard was to make the inspection designed to discover the condition that resulted in his injury. One cannot recover for injuries received in the performance of acts calculated to eliminate the actual cause of the in-

jury. *Byars* v. *Moore-McCormack Lines, Inc.* (2d Circuit), 155 F. 2d 587, where the court cited with approval the following language from *Mullin* v. *Genesee County Electric Light, Power & Gas Co.*, 202 N. Y. 275, at page 279, 95 N. E. 689, 690:

> "The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place when the very work in which the servant is engaged makes it unsafe."

See also *Bruszewski* v. *Isthmian Steamship Co.* (3d Circuit), 163 F. 2d 720.

The final decree is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York on the tenth day of July one thousand nine hundred and fifty-eight.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.
HON. CLARENCE G. GALSTON,
District Judge.

ADM 184-203

JAMES E. MCDANIEL,
Libellant-Appellant,

v.

M/S LISHOLT, her engines, boilers, tackle, apparel, etc., and A/S LISE,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the decree of the said District Court be and it hereby is affirmed; with costs to the Appellee.

A. DAVID FUSARO,
Clerk.

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—against—

M/S LISHOLT, her engines, etc., and
A/S LISE her owner,

Respondents.

BRIEF OF RESPONDENT A/S LISE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM 1958

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No. 424

BRIEF OF RESPONDENT A/S LISE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The citation of the opinion appealed from is 257 F. 2d 538.

JURISDICTION

The Petition presents no basis for the exercise of this Court's discretionary jurisdiction. Conflicts are not shown. Petitioner's arguments consist of little more than oblique attacks on findings of fact already resolved against him.

QUESTIONS PRESENTED

Petitioner's preamble to his "Questions Presented" misreads or misconstrues the opinion of the Court of Appeals in two glaring respects. (a) Petitioner says (p. 2) that the

Court of Appeals held "Since petitioner was a fireman by calling he could not recover on the ground of the owner's negligence." Actually, the Court of Appeals and the District Court held that there was no showing of a breach of the limited duty owing to a professional fireman, and therefore no negligence.

(b) Petitioner says (p. 3 and again on p. 6) that the Court of Appeals held the shipowner owed no duty to petitioner other than "to refrain from the infliction of wilful or wanton injury". The opinion of the Court of Appeals (Petition p. 15) reveals how transparently petitioner interrupted the Court below in mid sentence. Petitioner omits "and to exercise ordinary care to avoid injuring the fireman by any affirmative and active acts of negligence."

Having had his libel dismissed in the District Court, and that dismissal unanimously affirmed, petitioner now addresses himself at this eleventh hour to this Court's discretionary power of relief. It ill becomes him to do so with less than complete candor.

So too, petitioner's questions are valueless. They contain a premise of fact non-existent in any of the findings of the District Court, as affirmed by the Court of Appeals. Petitioner assumes he was "assisting stevedores in unloading stores." Findings 17, 18, 37, 38 and 39 (pp. 15a-16a and 20a) show petitioner's functions, purposes and authority in being aboard the m/s Lisholt as a member of the Panama Canal Zone Fire Department, none of which had anything to do with assisting stevedores.

Respondent submits the following questions as truly representative of the issues herein and notes in so doing that petitioner has said p. 3 "There was no controversy in respect to the facts."

1. Whether a shipowner warrants the seaworthiness of its vessel to a member of a public fire department where

(a) it has been found as a fact that a fireman comes aboard the vessel by virtue of the police power of the sovereign irrespective of the consent or authorization of the shipowner (Findings 17, 18, 37, 38 and 39; pp. 15a-16a and 20a)

(b) it has been found as a fact that the fireman is not performing a ship's service but rather one to the public (Finding 38; p. 20a)

(c) it has been found as a fact that very purpose for the fireman coming aboard an admittedly unseaworthy vessel following a disastrous fire was to make the inspection designed to discover the condition which resulted in his injury (Finding 37; p. 20a)

(d) it has been found as a fact that following the fire the vessel was "an unseaworthy hulk" incapable of navigation (Finding 38; p. 20a).

2. Whether a fireman in pursuit of his profession on a vessel is to be regarded as a business invitee when, if engaged in the same activity on land, he would be looked upon, by the overwhelming weight of authority, as a licensee.

3. Whether even if held an invitee the District Court's Findings and Conclusions preclude recovery where (a) petitioner's purpose in being aboard the vessel was to make the very inspection designed to discovery the condition that injured him. (Findings 17, 18 and 37; pp. 15a, 16a and 20a; Conclusion of Law 7, p. 25a) and (b) where petitioner as a fireman assumes the ordinary risks of his calling *viz.* the dangers of discovering hidden or undetected fires (Findings 17, 18 and 37; pp. 15a, 16a and 20a; Conclusion 8, p. 27a).

STATEMENT OF CASE

Petitioner states that there was no controversy with respect to the facts. The facts were found by the District Court and are thirty-nine in number and occupy eleven pages of petitioner's appendix below.

When such detailed and comprehensive findings are restated in summary form in three pages of the Petition herein, opportunities abound for wholesale omissions, abridgements, distortions and unsupported inferences. For example it is implied (p. 3) that at 8 A. M. on February 6, 1954 all members of the Fire Department left the vessel. This is contrary to Findings 7 and 17 of the District Court (pp. 11a, 12a and 15a) which show that the majority of firemen left at 9:30 A. M. and that thereafter one or two firemen were aboard all day.

Further out-of-context recitals appear when petitioner mentions only the inspections and activities of the crew. Overlooked are:

(1) The fact that an inspection was made of the refrigerating space area between 8 and 9:30 A. M. by the fire department (Finding No. 8, p. 12a).

(2) The Chief Steward and Chief Cook thought that the smoke or gas they encountered between 9 and 10 A. M. in the morning of February 6 was a residue of the fire (Finding 9, p. 12).

(3) That at about 11:30 A. M. an official of the Terminals Division of the Panama Canal Company and a stevedore sub-foreman entered the outer refrigerating box and noted only a slight refrigerant odor (Finding 12, p. 14a).

(4) That at 2:30 P. M. a stevedore sub-foreman entered the inner refrigerator box and reported only that the meat was as hard as a rock (Finding 15, p. 15a).

(5) That the Terminal Division official previously mentioned had been assured by the Fire Department everything was all right (Finding 12 p. 14a).

(6) That no one, whether Fire Department members, representatives of the Panama Canal Company or ship's personnel knew or suspected a smouldering within the walls of the refrigeration rooms (Findings 31 through 36, p. 19a).

(7) That the fireman whom petitioner relieved at 4 P. M. told him all was quiet (Finding 17, p. 15a).

(8) That no danger was suspected until some time after 4:30 P. M. (Finding 20, p. 16a).

Petitioner closes his "Statement of Case" by attempting to have this Court draw an inference that smoking touched off the explosion which on the testimony, and particularly on petitioner's contrary testimony, which inference the District Court found impossible to draw (Finding 25, pp. 17a-18a). Finding 25 notes that petitioner denied seeing anyone smoking or lighting cigarettes. No crew members were present at the time (Finding 30, p. 18a). The Chief Steward and Chief Cook both had left the area before the explosion (Finding 16, p. 15a). Furthermore most of petitioner's references are to the original testimony rather than to the findings based on the original testimony.

As with his "Questions Presented" petitioner's "Statement of Case" unfortunately cannot be relied upon as a factual preparation for petitioner's discussion of law to follow. It is particularly distressing to respondent to find it necessary to encumber its brief with refutations of petitioner's view of the facts, especially when petitioner says here, as he did in the Court of Appeals, that "There was no controversy in respect to the facts".

Respondent believes that petitioner's "Statement of Case" is of no value whatsoever and urges the Court to

refer only to the 39 Findings of Fact made by the District Court (10a-20a). None of these were found clearly erroneous, arbitrary or without basis in evidence by the Court of Appeals.

POINT I

NO WARRANTY OF SEAWORTHINESS IS OWED TO PETITIONER, A MEMBER OF A PUBLIC FIRE DEPARTMENT BECAUSE:

1. *It has been found as a fact that petitioner was not aboard the vessel by contract, arrangement or consent of the shipowner either directly with him or indirectly through petitioner's employer* (Findings 17, 18, 19 and 38, pp. 15 to 16a and 20a).

In *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, p. 95, this Court pointed out that the warranty of seaworthiness:

> "* * * is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his *consent or by his arrangement.*" (Emphasis supplied)

At page 96 this Court said:

> "Not the owner's consent to liability, but his consent to performance of the service defines its boundary".

Again at page 97 this Court said:

> "Accordingly we think the Court of Appeals correctly held that the liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent."

Respondent could hardly be said to have consented to the presence of petitioner aboard the vessel when it has been found as a fact that its consent could not be with-

held and respondent has not power to exclude libelant from the vessel for his own safety (Findings 38 and 39, p. 20a). Fire Chief Burke called as an expert witness by respondent herein, testified (Record 179) as to the police powers of a Fire Department. This authority is explicitly set forth in the Rules and Regulations Governing Navigation in the Panama Canal and Adjacent Waters, § 9.3 (Rule 97, as amended by E. O. 9227 of August 19, 1942; 35 C. F. R. 4.136).

In *Kermarec* v. *Compagnie Generale Transatlantique*, (2 Cir.) 245 F. 2d 175 cert. granted 355 U. S. 902, relied on by petitioner, the shipowner could have excluded the injured man from the vessel.

2. *It has been found as a fact that petitioner was not performing a ship's service.* Whether or not petitioner was performing a ship's service is a question of fact. There have been findings of fact in this case (Findings 17, 18 and 38, pages 15a-16a and 20a) that libelant was aboard the vessel in the primary interest of the public, performing duties traditional or customary for firemen following a fire. He was not performing any traditional or customary activity of the crew (Court of Appeals opinion p. 14, petitioner's brief).

Petitioner now characterizes these findings of fact as "arbitrary and without evidence to support them". This is an extraordinary statement in view of petitioner's own statement of "no controversy" as to the facts and also because the Findings themselves explicitly set forth the evidence and testimony relied on by the District Court to show that petitioner's functions, authority and purposes in being aboard the m/s Lisholt were peculiarly those of a fireman. The distinction sought to be drawn between fireman and fire watchman was rejected by the District Court as of no significance (Finding 18, p. 15a-16a).

There is no doubt from the previously quoted language from *Sieracki* supra, that to qualify for the warranty of seaworthiness the individual must somehow be in the ship's service in addition to being aboard with the owner's consent.

Petitioner nevertheless contends that the Court of Appeals decision is in conflict with *Seas Shipping Co. Inc.* v. *Sieracki* 328 U. S. 85 and *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 as to the scope of the warranty and implies that the Second Circuit is still following *Guerrini* v. *United States*, 167 F. 2d 352, (1948) in determining who may qualify. That this is not so is manifest from the language in *Halecki* v. *United N. Y. & N. J. S. H. P. Ass'n*, 251 F. 2d 708, 711 cited by petitioner.

In limiting the warranty of seaworthiness to those who perform a ship's service with the ship's consent, the Court of Appeals for the Second Circuit is in complete accord with the language of *Sieracki* rather than in conflict with it.

Petitioner cites a conflict between decisions in *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 in the Second Circuit. *Read* v. *United States*, 201 F. 2d 758 in the Third Circuit as grounds for granting certiorari herein. What petitioner overlooks is that this very conflict was raised in the *Berge* case on pages 6 and 8 of Berge's petition for certiorari therein and certiorari was denied by this Court 356 U. S. 958. If this Court deemed the conflict was insufficient to grant certiorari in the *Berge* case itself, it is difficult to appreciate how it can be of greater importance in the within case.

Recently this Court has denied certiorari in a number of these cases where the warranty of seaworthiness was sought, to be extended to shore repairmen. In each it was held that the man was not performing a traditional seaman's service. The first two cases occurred in drydock and the latter while the vessel was moored alongside a pier. See *Berryhill* v. *Pacific Far East Line*, (9 Cir.) 238 F. 2d 385, cert. den.

354 U. S. 938 (1957); *Raidy* v. *United States* (4 Cir.) 252 F. 2d 117, cert. den. 356 U. S. 973 (June 2, 1958); *Berge* v. *National Bulk Carriers Corp.* (2 Cir.) 251 F. 2d 717, cert. den. 356 U. S. 958 (May 19, 1958). The ship repairman in each, unlike petitioner here, was an invitee aboard the vessel by some consent, contract or arrangement with the shipowner, but found not entitled to the warranty because he still was not engaged in traditional seaman's work. Thus, against petitioner's argument that the Second Circuit has unduly limited the warranty of seaworthiness it is only necessary to show the uniformity of decision among the various Courts of Appeal and the consistent denial of certiorari by this Court.

The rationale for this line of cases is found in *Atlantic Transport Co.* v. *Imbrovek* 234 U. S. 52, 61 which provided much of the underlying philosophy for this court's decision in *Sieracki*, 328 U. S. 85, 97 extending the warranty of seaworthiness to longshoremen. In *Imbrovek* this Court pointed out, page 62, that formally the work was done by the ship's crew, but a specialized service had developed, as this Court agreed upon a class as "clearly identified with maritime affairs as are the mariners". It would indeed be stretching a point to say that a fireman in petitioner's capacity belongs to a class "as clearly identified with maritime affairs as are the mariners".

There is little question that the Courts have restricted the warranty of seaworthiness to those who meet the criteria set forth in *Sieracki* and following decisions. Those who do not qualify are not entitled to the warranty, however humanitarian it might be to have them awarded recompense for injuries suffered. This Court pointed out in the *Sieracki* opinion, 328 U. S. 85, 95:

> "It is a form of absolute duty owing to all *within the range* of its humanitarian policy". (Emphasis supplied)

This is limiting language.

3. *It has been found as a fact that petitioner's very purpose in being aboard the vessel was to seek out and discover hidden and undetected fires, the very condition resulting in his injury* (Finding 17 and 37, p. 15a and 20a). A logical and well recognized exception to the warranty of seaworthiness is that it has no application to those who come aboard a vessel seeking to repair, eliminate or inspect for an unseaworthy condition (Conclusion 6b) and are injured by reason of that very condition. *Bruszewski* v. *Isthmian Steamship Co.* (3 Cir.) 163 F. 2d 720; *Byars* v. *Moore-McCormack Lines, Inc.* (2 Cir.) 155 F. 2d 587; *Filipek* v. *Moore-McCormack Lines,* (2 Cir.) 258 F. 2d 734.

4. *It has been found as a fact that the vessel was an "unseaworthy hulk" incapable of navigation.* It was a finding of fact that the vessel's engine room and superstructure were burned out, that it had no motive power to navigate, light, heat, cook or refrigerate, that it was listing, with water in its compartments and engine room and that the will of the sovereign had been superimposed on its own disclipine (Finding 38, p. 20a).

The warranty of seaworthiness should not be imposed on a vessel in such circumstances as it was not in navigation. *West* v. *United States,* 256 F. 2d 671.

POINT II

A FIREMAN BY THE OVERWHELMING WEIGHT OF AUTHORITY IS DEEMED TO BE A LICENSEE ON PREMISES WHERE HE IS PURSUING HIS PROFESSION. IT IS THE FINDING OF THE DISTRICT COURT THAT RESPONDENT BREACHED NO DUTY OWING TO PETITIONER EITHER AS A LICENSEE OR SUI GENERIS.

As previously pointed out petitioner twice misquotes the definition of licensee given by the Court of Appeals

herein (p. 3 and 6 petition). No argument is made however that the District Court or Court of Appeals erred in finding no breach of any duty owed a licensee.

Findings 28 through 36 p. 18a-19a confirm that there was no activity by respondent which would constitute a breach of duty owed to a licensee or even if a fireman be viewed as *sui generis* in a privileged person category. (District Court opinion p. 26a-27a).

Petitioner's only argument is that he was not a licensee and it was arbitrary for the Courts to so hold. Petitioner cites no statutes, decisions or policy for this assertion and seeks only to tie himself to the coat tails of *Kermarec* v. *Compagnie Generale Transatlantique*, 245 F. 2d 175 cert. granted 355 U. S. 902 currently pending before this Court.

The overwhelming weight of authority in this country is that a fireman, a member of a public fire department, in this discharge of his duty is a licensee. 2 Harper & James, The Law of Torts (1956) section 27.14 subsection 2.65; Corpus Juris Secundum § 34 p. 490, p. 493; 13 A. L. R. 633; 141 A. L. R. 580. Prosser Handbook of The Law of Torts (1955) Sec. 78 p. 461.

All the policy reasons for designating firemen as licensees on land apply equally well on sea. The fireman may board the vessel without the consent or invitation of the owner. He may take charge and control of the premises. The interests of the public are best served by having the fireman assume the risk of the fire and its consequences than having the owner of the premises, faced with damage suits by injured firemen, have an economic deterrent for not reporting fires or attempting to cope with them unaided. Police or firemen are permitted to enter premises or portions thereof without warning. the owners are deprived of opportunities to make conditions safe for their entry.

POINT III

EVEN VIEWED AS AN INVITEE THE FINDINGS BELOW PRECLUDE RECOVERY BECAUSE PETITIONER WAS INJURED BY A CONDITION HE WAS ABOARD TO INVESTIGATE AND BECAUSE AS A FIREMAN HE ASSUMED THE RISK OF FIRE AND ITS CONSEQUENCE.

Even if the Findings of the District Court be totally disregarded and it be assumed, contrary thereto (Findings 18 and 38 p. 15 and 20a), that petitioner was aboard at the invitation or consent of the shipowner and was therefore an invitee he is still precluded from recovery because Findings have been made (17, 18, 37 and 39, p. 15a-16a and 20a) showing that he was that unique type of visitor whose purpose in being aboard was to make the inspection designed to discover the condition that injured him. Thus it becomes ludicrous to say that the vessel had a duty to inspect for hidden fires aboard the vessel in order to advise petitioner of their existence so that when petitioner undertook his inspection for hidden fires he might be assured he would not find any.

Another way of stating this is to say that petitioner assumed the usual risks of his calling. The District Court carefully pointed out that while the defense of assumption of risk is not generally applicable to maritime torts it does apply to risks which one's calling requires one to face. What is ordinary to one calling may of course be unusual or unwarranted to another. It has been found as a fact that libelant's calling required him to make an inspection of the vessel for hidden fires and undetected smoulderings or any rekindling of the major blaze. (Finding 17 and 18 conclusion of law 8, pages 15a-16a and 27a). He was injured by one of the very hazards or dangers he was called upon to investigate and not by some unrelated condition. Not only did petitioner in a general way assume the risks

of fire and its consequences but specifically did so herein. He was fully conscious of the danger of explosion when he returned to the refrigerating rooms to investigate the cause of gas and possibly to attempt eliminations (Findings 28-29 p. 18a). All this was part of his job as fireman. If he were not a fireman and a representation of the Canal Zone Fire Department on the vessel he would not have been asked by the stevedore foreman to make the inspection and if he were not a fireman he need not have done so even if asked.

With perspicacity the District Court noted (pp. 26a-28a) that no duty to inspect was owed to petitioner not only because he was a licensee, but because he was the inspector and further even if considered a higher order of visitor than licensee he assumed the usual risks of his calling. Thus petitioner's claim to a recovery as an invitee was anticipated, considered and rejected by the District Court on the foregoing analysis.

CONCLUSION

The petition establishes no conflict in decisions and is principally concerned with arguing facts already resolved against petitioner. It should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1958

No. 424

JAMES E. MCDANIEL,

Petitioner,

against

M/S LISHOLT, her engines, etc. and A. S. LISE, her owner,

Respondent.

REBUTTAL BRIEF FOR PETITIONER

POINT I

Petitioner assumed the ordinary risks of his occupation as fire watch of which negligence of the owner or master is not one. (Answering respondent's Point III).

It is conceded that the owner's negligence caused the fire and had there been no fire there would have been no explosion. It is uncontradicted that before the explosion the stevedore foreman complained to the ship's agent about the conditions in the refrigerator space. The ship's agent thought a chemist should be called and blowers put into operation to dissipate the gas. However, prior to the explosion no blowers were in operation. The stevedores continued with their work and were permitted to smoke in the area. Nevertheless respondent contends petitioner assumed the risk of an explosion when he went to the aid of the stevedores and inspected the freeze box as this was one of the usual risks of his calling. No cases or statutes are cited.

This argument was disposed of by the court in *Roberts* v. *United Fisheries Vessels Co.*, 1 Cir., 141 F. 2d 288 at pages 292, 293:

> "He is held to assume the ordinary risks of his occupation, of which negligence of the owner or master is not one. This is true under the Jones Act as well as under the general maritime law (Citing cases). * * * The presence or absence of negligence governs the verdict. If there is no negligence the plaintiff cannot recover. If the defendant is negligent he cannot avoid the effect of it by pleading assumption of risk. Such a defense is absolutely 'out of the window' since the statute and since the decision in *Tiller* v. *Atlantic Coast Line Co.*, 318 U. S. 54, 63 S. Ct. 444, 453, 87 L. Ed. 610, 143 A. L. R. 967."

POINT II

Respondent's argument equating petitioner with a workman employed aboard to repair or inspect an unseaworthy appliance is invalid. (Answering respondent's brief, page 10).

It is urged that the warranty of seaworthiness did not extend to petitioner because it was part of his duty to inspect the admittedly unseaworthy refrigerator space. Respondent relies upon *Bruszewski* v. *Isthmian Steamship* Co. (3 Cir.), 163 F. 2d 720 and *Byars* v. *Moore-McCormack Lines* (2 Cir.), 155 F. 2d 587.

In those cases shoreside workers were injured while correcting unseaworthy conditions that were "obvious and notorious." Here as respondent emphasizes "no one knew * * * or suspected a smoldering within the walls of the refrigeration rooms" (Respondent's Brief, p. 5).

Petitioner submits that this vital difference in the factual situation leads to quite different results.

The rule applicable here is stated in *Dixon* v. *United States,* 120 F. Supp. 747 aff'd 219 F. 2d 10 (1955). There the chief mate sued for injuries sustained while inspecting a ladder which had been repaired to ascertain if the shoreside workers had made it seaworthy. The respondent there, as in the instant case, urged there could be no recovery because it was his duty to locate and eliminate the unseaworthy condition that caused his injuries.

The District Court held at page 749:

> "The respondent relies heavily upon *Bruszewski* v. *Isthmian S. S. Co.,* 3 Cir., 163 F. 2d 720 and *Byars* v. *Moore-McCormack Lines, Inc.,* 2 Cir., 155 F. 2d 587. Factually, I do not believe these cases are apposite. In both instances the employees, both of them shoreside, were engaged to repair the condition which was the direct cause of the injury and were warned or chargeable with knowledge of the dangers. The defective condition *was obvious and notorious. Here the condition was latent and unknown.*" (Emphasis added)

And at page 750:

> "Our own Court of Appeals in *Becker* v. *Waterman S. S. Corp.,* 2 Cir., 179 F. 2d 713, 714, was careful to limit the effect of the Byars case to the situation of a repairman of an independent contractor injured by that which he was to repair."

In a footnote to the opinion it was pointed out that:

> "In the Byars case the theory of unseaworthiness was never litigated or raised on appeal. Perhaps accounting for this is the fact that *Seas Shipping Co.* v. *Sieracki, supra,* extending the doctrine beyond actual seamen, was not handed down by the Supreme Court until after argument was heard in the Court of Appeals in Byars."

In affirming, the Court of Appeals held at page 16:

> " • • • American courts have uniformly refused to allow assumption of risk as a defense to a seaman's

action for injuries under the general maritime law. See discussion in *The Arizona* v. *Anelich* (1936), 298 U. S. 110, 56 S. Ct. 707, 80 L. Ed. 1075; *Socony-Vacuum Oil Co.* v. *Smith* (1939), 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265. Hence, even though it was part of Dixon's duty to check the ladder and he had proceeded to the job with actual knowledge of the dangerous condition of the upper rungs, the shipowner could not have said that Dixon thereby assumed the risks involved. (See *Becker* v. *Waterman S. S. Corp.*, 2 Cir. (1950), 179 F. 2d 713.) * * * "

Petitioner, like Becker and Dixon, was not in the position of Byars, a repairman injured by an "obvious and notorious" defect which he was employed to repair. As in *Dixon* the defect here was "latent and unknown." The trial court found there was no evidence that any one knew until after the explosion that the cork insulation in the wall of the freeze box had been smoldering progressively since the fire, creating an explosive atmosphere consisting of carbon monoxide and other unknown gases (19a; 27a). It would seem quite clear that the decisions in *Becker* and *Dixon* and not *Byars* and *Bruszewski* are controlling.

POINT III

Even under real property concepts a fire watch is a business visitor and not a licensee. (Answering respondent's Brief, Point II).

Respondent urges that McDaniel as a fireman was a licensee who assumed the risk of his calling and was owed no duty of reasonable care.

While respondent's obligations to McDaniel should be determined under applicable principles of maritime law and not under shoreside concepts of a "licensee," even those shoreside concepts do not support respondent's position.

The early view that injured fireman should have no recourse for injuries sustained in *fighting* fires was probably best expounded in *Lunt* v. *Post Printing Co.*, 48 Colo. 316, 110 Pac. 203 (1910) where the Court said:

> "In times of conflagration, or indications thereof, ordinary people lose their power of judgment and are not qualified to direct. Owners of property whereon are indications of fire, will and should be, for the time, suspended from control and the trained firemen, as the representatives of the public, be in absolute command, unhampered by the wishes or directions of any individual."

That is not the situation in the case before this Court. The Lisholt fire was considered extinguished, the fire-fighters had retired from the scene, the vessel was in full control of her master and crew, and at 4:00 p. m., 16 hours after the fire started and 8 hours after it was considered extinguished, petitioner came aboard to stand watch.

As to the actual fire-fighting scene in the *Lunt* case, even under the conditions precedent to the application of that rule, a rule which the Court admitted was "harsh", *id.*, 337, it was roundly criticized in an article entitled *"The Duty of a Landowner Toward Those Entering His Premises On Their Own Right,* 69 U. Pa. L. Rev. 142, 352, fn. 25," Professor Bohlen said of the *Lunt* case:

> "And while the 'stress and excitement' of a fire and the necessity of prompt decision would naturally create an emergency which would excuse mere errors of judgment, it is submitted that a fireman while performing his duties is not a chartered libertine free to injure private property at his own whim and caprice, and should not be made an outlaw and a wolf's head to whom no man owes any duty of care.
>
> "The very fact that the Colorado Court thought it necessary to bolster up its principal theory by arguments so manifestly unsound of itself lessens the weight of its opinion."

It is submitted that had petitioner been injured aboard this foreign vessel even while engaged in the emergency of extinguishing a raging fire, the application of the rule respondent urges would be "harsh" and "unsound".

Respondent introduces the trespasser-licensee-invitee concepts. These terms, as used in connection with real property, are defined and well explained in the Restatement of Torts. Under the Restatement of Torts, petitioner by analogy to the land rules is not a "licensee"—as respondent urges—but a "business visitor". Section 343 of the Restatement sets forth the liabilities of the land owner to a "business visitor" and in "Comment (d)" states:

> "d. When the presence of an *inspector or other official* on the land is necessary to the possessor's lawful conduct of his business, the official is a business visitor of the possessor and, as such, entitled to the protection stated in § 343." [emphasis added]

Petitioner was therefore, in any case, a "business visitor". He was lawfully aboard and engaged in the ship's normal business of standing watch and was a "business visitor" under the general real property rules. If emphasis is to be given to his fire department employment, then he was a "business visitor" in the special sense of an "inspector or other official", and not a firefighter, aboard to help the ship comply with the maritime and local requirements to provide a "fire watch" at all times in port.

Section 343 of the Restatement of Torts makes a landowner liable for injuries to "a business visitor" resulting from "a natural or artificial condition" which the landowner knew or should have known involved an unreasonable risk.

This Restatement rule was expressly approved by Judge Learned Hand in *Grillo* v. *Royal Norwegian Government*, 139 F. 2d 237 (2 Cir. 1943) and *Puleo* v. *H. E. Moss & Co.*, 159 F. 2d 842 (2 Cir. 1947).

Appropriate here is the language of Judge Cardozo when speaking for the New York Court of Appeals in *Wagner v. International Ry. Co.*, 232 N. Y. 176:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid (*Gibney* v. *State of N. Y.*, 137 N. Y. 1). The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path (*Eckert* v. *L.I.R.R. Co.*, 43 N. Y. 502. Cf. *Matter of Waters v. Taylor Co.*, 218 N. Y. 248). The rule is the same in other jurisdictions (*Dixon* v. *N. Y., N. H. & H. R. R. Co.*, 207 Mass. 126, 130, and *Bond* v. *B. & O. R. R. Co.*, 82 W. Va. 557, with cases there cited. Cf. 1 *Beven on Negligence*, 157, 158). The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had (*Ehrgott* v. *Mayor, etc., of N. Y.*, 96 N. Y. 264, 280, 281)."

November 20, 1958.

Respectfully submitted,

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